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IN THE

Supreme Court of the United States

October Term, 1949.

No. 520-524

PARAMOUNT PICTURES, INC., PENNWARE THEATRE CORPORATION, A. N. NOTOPOULOS, RKO RADIO PICTURES, INC., LOEW'S INCORPORATED, TWENTIETH CENTURY-FOX FILM CORPORATION, and PARAMOUNT FILM DISTRIBUTING CORPORATION,

Petitioners,

v.

HARRY NORMAN BALL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Petitioners,

v.

HARRY NORMAN BALL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Paramount Pictures, Inc., Pennware Theatre Corporation, A. N. Notopoulos, RKO Radio Pictures, Inc., Loew's Incorporated, Twentieth Century-Fox Film Corporation and Paramount Film Distributing Corporation pray that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on September 2, 1949, pursuant to judgments entered July 21, 1948, and July 29, 1949.

OPINIONS BELOW.

The opinions of the United States District Court for the Western District of Pennsylvania are reported at 57 F. Supp. 505 and 67 F. Supp 1. The opinions of the United States Court of Appeals for the Third Circuit are reported at 169 F. 2d 317 and 176 F. 2d 426. The opinion of September 2, 1949, has not yet been reported.

STATEMENT OF THE MATTER INVOLVED.

This action was brought by the respondent under the Sherman and Clayton Acts (Act of July 2, 1890, 26 Stat. 209, 15 U. S. C. 1, 2; Act of October 15, 1914, 38 Stat. 731, 15 U. S. C. 15). Respondent asked for injunctive relief and damages.

Respondent is a Philadelphia lawyer who, as trustee for himself and members of his family, purchased (subject to Pennware's lease mentioned in the next paragraph) the Penn Theatre in Ambridge, Pennsylvania, in August, 1943. Prior to the purchase of the theatre respondent never had any interest in nor had he ever operated a motion picture theatre (Finding No. 19; R. 547).

Until April 30, 1944, when the lease expired, petitioners Pennware Theatre Corporation and A. N. Notopoulos operated the Penn Theatre under a lease from its previous owner (Finding No. 16; R. 546). Notopoulos has operated motion picture theatres in Ambridge and vicinity for many years (Finding No. 15; R. 546).

The other petitioners are four distributors of motion pictures (Finding No. 10; R. 545). Paramount Pictures, Inc., one of the petitioners, owns one-half of the stock of Pennware (Finding No. 15; R. 546).

Prior to May, 1933, all of the stock of Pennware was owned by a wholly-owned subsidiary of Paramount. In May, 1933, Notopoulos purchased for $1,000 one-half of the stock of Pennware from the Paramount subsidiary. There-

after Notopoulos became the manager and supervisor of the Penn Theatre and, together with his sons, conducted all of the negotiations for the licensing of pictures for exhibition at the Penn Theatre (Findings Nos. 14, 15 and 37; R. 546, 553).

At least from the time Notopoulos obtained his interest in Pennware, Paramount licensed all its pictures to Pennware for first run exhibition in Ambridge at the Penn Theatre. And for varying periods of years, running back more than ten years in each case, Loew's, RKO and Twentieth Century-Fox each licensed one-half of its motion picture product to Pennware, through Notopoulos, for exhibition on first run in the Penn Theatre. The other half was exhibited by Warner Bros. on first run at its two theatres in Ambridge (Finding No. 17; R. 547).

The town of Ambridge is located about fifteen miles southwest of the City of Pittsburgh, in the Western District of Pennsylvania. It has a population of between 21,000 and 22,000 (Finding No. 28; R. 550). In April, 1944, when this action was commenced, it had three motion picture theatres—the Ambridge and Prince Theatres, owned and operated by Warner Bros. (Finding No. 17; R. 547), and the Penn Theatre, leased and operated by Pennware (Finding No. 15; R. 546).

In the early part of 1943, the Penn Theatre was purchased by a New York real estate operator named Mannheimer, a friend of Joseph Bernhard, then Executive Vice-President of Warner Bros. (Finding No. 18; R. 547, 1021-1022).

The lease, under which Notopoulos was operating the theatre for Pennware, ran to April 30, 1944, and provided for an annual rental of $3,600 (Finding No. 16; R. 546). Before Mannheimer purchased the theatre Notopoulos had turned down an opportunity to buy it for $46,000 (R. 649).

After Mannheimer purchased the theatre, he set a figure of $12,000 per year for its rental, or $125,000 for its

sale. At a rental of $12,000,—an increase of $8,400 per year over the current rental,—Notopoulos and Pennware would have lost money in every one of the six preceding years and in 8 of the 10 years from 1934 to 1943 (Finding No. 18; R. 547).

Under these circumstances and with the expiration of its lease approaching, Pennware had the alternative of being forced out of business in Ambridge, or of erecting its own theatre. It chose the latter course, and on February 5, 1943, purchased a property for this purpose (Finding No. 18; R. 547).

In August, 1943, respondent, who, like Mannheimer, was a friend of Bernhard, purchased the Penn Theatre from Mannheimer virtually sight unseen for $110,000 (Finding No. 19; R. 547, 1025-1026). He had not contacted Pennware or Notopoulos and did not know that after Mannheimer's ultimatum, Notopoulos, for Pennware, had acquired a site for a new theatre (Findings Nos. 17, 21, 24; R. 547, 548, 549).

Upon purchasing the Penn Theatre, respondent did not contact Pennware or Notopoulos. Instead, he embarked upon a course of conduct which, had it been successful, would have forced Pennware out of Ambridge as an exhibitor, and would have resulted in the pooled operation of all three theatres in the town (Finding No. 20; R. 548).

Respondent's first act after acquiring ownership of the Penn Theatre was to propose to Bernhard of Warner Bros. that the Penn Theatre be operated jointly with the Ambridge and the Prince Theatres in a pool. Bernhard concurred, but stated that he did not think it feasible to go into details until respondent had first acquired possession of the Penn Theatre (Finding No. 20; R. 548).

On November 9 and again on November 16, 1943, respondent notified Notopoulos that he was cancelling the lease of the Penn Theatre, and demanded immediate pos-

session, on the trivial charge that the tenant was in arrears on a contribution toward heat and janitor service (Finding No. 22; R. 548).

In the meanwhile, in October, 1943, Notopoulos and Pennware began construction work on a new theatre—the State Theatre, on the site purchased for the purpose in February, 1943. Respondent stated he first learned about the construction work on November 1, 1943 (Finding No. 21; R. 548, 678, 1031-1032).

During December, 1943, or January, 1944, respondent once again consulted Bernhard, this time to contrive means to prevent Pennware from constructing its new theatre. Thereupon he sent a telegram to the War Production Board urging it to stop the building of the State Theatre (Finding No. 23; R. 549).

Not until January 5, 1944, did respondent first consult or make any approach to Notopoulos concerning the renewal of the lease. Throughout the negotiations which ensued, Pennware made a sincere effort to renew the lease on reasonable terms. But respondent persisted in his demand for an exorbitant rental several times the current rental. Had the rental demanded by respondent been in effect, it would have resulted in a loss to Pennware from operations of the Penn Theatre during every one of the preceding 6 years. On the other hand, respondent rejected offers of a net rental of $7,000 per year for the entire premises, or $6,000 annually during the war and $5,000 annually thereafter for the theatre only. These offers contrasted with the current rental of $3,600 per year (Finding No. 24; R. 549).

On March 30, 1944, respondent wrote a letter to three of the four petitioner distributors (RKO, Twentieth Century-Fox and Loew's) which, in effect, constituted a demand by respondent that each of the distributors license to him the same proportion of its future pictures as it had previ-

ously licensed to Pennware and Notopoulos (Finding No. 36; R. 553, 33, 37, 40).

On April 12, 1944, 18 days before Pennware's lease expired, respondent filed his complaint against Pennware, and against Notopoulos and Paramount Pictures as Pennware's shareholders, seeking to restrain the removal of Pennware's equipment from the Penn Theatre and to enjoin these parties from procuring any pictures for the new State Theatre when completed.

On July 6, 1944, respondent filed an amended complaint joining Loew's, Paramount Film, RKO and Twentieth Century-Fox to the list of the original defendants, requesting both a preliminary and final injunction against the licensing of **any**[1] pictures for the new State Theatre[2] and a decree compelling each distributor to license to respondent for the Penn Theatre the same proportion of its pictures as had previously been licensed to Pennware. He did not join the distributors who were licensing pictures to Warner Bros. only, for exhibition at its two theatres in Ambridge, from which it is apparent that he did not wish to disturb in any way the licensing of pictures by any distributor to Warner Bros. Nor did he join Warner Bros. as a defendant.

Throughout the negotiations between respondent and the petitioner distributors, respondent did not seek merely an opportunity to compete on an equal basis with Notopoulos and Pennware. He demanded of each of the distributors that it license to him **all** of the pictures it had or would have available, and that it license **none** to Pennware, which had been its customer for many years.

About the end of April, 1944, respondent tried to induce Loew's to give him all its available first run pictures for a period of one year, by offering to pay $1,000 more than it had previously received from Notopoulos at the Penn Theatre (R. 124). About the middle of May, 1944, respondent's brother-in-law and agent, Friedman, made the

1. Wherever boldface appears in this Petition the emphasis is ours.
2. The State Theatre was opened on May 24, 1944 (R. 870, 879).

same proposal to RKO (R. 186, 954); and about the middle of June,[3] to Twentieth Century-Fox (R. 1017). (The testimony showed that the respective representatives of each distributor to which this offer was made believed that even if its acceptance were possible under the policy of not licensing more than a small number of trade-shown pictures at a time, it would not receive from the Penn Theatre, with its less than 500 seats, the revenue reasonably to be expected from the State Theatre, with its 45% greater seating capacity, R. 912-913, 951-953, 1001, 1017-1018.)

In the amended complaint, as well as in the original complaint, respondent sought to enjoin the distributors from licensing **any** feature pictures first run to Notopoulos and Pennware (R. 19).

Throughout the trial, counsel for respondent, in describing to the court the nature of the relief sought, indicated that respondent was seeking a decree enjoining the distributors from furnishing **any** pictures for exhibition on first run at the State Theatre and compelling the distributors to furnish **all** their available pictures to the respondents (R. 617, 791).

In the case of each of the four petitioner distributors, its branch manager and its executives who participated in the matter described in detail just how respondent's request for all of the available product was considered in each company, and how and why each separately, individually, and at different times extending over a period of two months, decided to turn it down (R. 357, 912-913, 951-953, 1001).

After an extended trial, at which the trial court heard most of the witnesses,[4] including respondent and Friedman,

3. Respondent testified that the Penn Theatre was ready to be reopened about the middle of June, 1944 (R. 47).

4. The trial was begun before Judge Schoonmaker, who died on September 5, 1945. Pursuant to the following stipulation of all parties, Judge Gibson proceeded to hear the case (R. 790):

"Now, February 4, 1946, the Honorable Frederic P. Schoonmaker, Judge of this Court having died after the beginning of the trial of this action it is hereby stipulated that the trial may be continued before such Judge of this Court as may be assigned thereto, and that all proceedings

who were the only witnesses called by the respondent on the issue of conspiracy, the court made exhaustive findings of fact, 37 in number, and filed a supporting opinion. He found that each petitioner distributor had acted independently without consulting any other distributor and without concert of action, and that no representative of Paramount had any part in Pennware's obtaining any license from any other distributor (Finding No. 32; R. 552). He found further that each distributor exercised its independent business judgment in refusing to select respondent rather than Pennware as its customer, and was influenced by the fact that it could expect greater revenue from an experienced exhibitor's operation of the considerably larger State Theatre than from an inexperienced newcomer's operation of the considerably smaller Penn Theatre (Findings Nos. 32, 33, 34; R. 552). Finally he found that neither Pennware nor Notopoulos combined or conspired with any of the other petitioners in restraint of trade or commerce (Finding No. 33; R. 552); and that neither Loew's, RKO nor Twentieth Century-Fox was influenced by Paramount, or its power in the motion picture industry (Finding No. 34; R. 552).

The District Court concluded that there was no combination or conspiracy in restraint of trade between or among the petitioners or any two or more of them (Conclusion V; R. 554) and entered an order dismissing the bill.

On appeal, the Circuit Court of Appeals disregarded the findings of the District Court; held that the petitioners were engaged in a conspiracy against respondent and directed the District Court to enter a decree in favor of the

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before Judge Schoonmaker on and after July 24, 1944, shall be deemed to have been before such assigned Judge."

Of the 22 witnesses who testified at the trial, Judge Gibson heard and saw 13 of petitioners' witnesses, and all of respondent's, except one who did not testify at all on conspiracy, but only on the alleged physical condition of the Penn Theatre after the termination of the lease. He heard and saw respondent when called by the petitioners, and his brother-in-law when called in rebuttal.

respondent and for injunctive relief, and to ascertain the amount of damages sustained by the respondent. 169 F. 2d 317 (C. C. A. 3, 1948).

Judge Goodrich wrote a dissenting opinion in which he pointed out that the majority had substituted its judgment for that of the trial court on facts which depend upon credibility of witnesses and where "the simple question of fact" was whether the "witnesses told the truth or whether they lied"; he urged that when the trial judge's "conclusion as to which witnesses to believe and which witnesses not to believe is backed up by circumstances which show that his conclusion is a rational one, * * * so far as a case turns upon questions of fact the answers to those questions by the trier of the fact should be accepted"; he pointed out several fundamental findings of fact which the majority entirely ignored; and he admonished against the majority's substituting "a hunch, however judicial, for facts advertently found."

Pursuant to the mandate, the District Court, on December 13, 1948, entered a decree granting an injunction. Again respondent appealed. His primary objection was that the decree permitted Pennware's survival as an exhibitor in Ambridge. He submitted to the Court of Appeals a proposed form of decree enjoining the licensing of any pictures to Pennware, prohibiting the operation of the State Theatre as a motion picture theatre, and ordering the four petitioner distributors to "grant franchises to plaintiff [respondent], effective immediately, to remain in effect until further order of the Court, * * * of all of the product of Paramount and one-half (equitably divided) of the product of Loew's, Fox and RKO." (Respondent still did not seek the other one-half of the respective motion picture product of Fox, Loew's or RKO, which was being licensed for exhibition by Warner Bros. when the suit began.)

Petitioners filed cross appeals in order to avoid any inference that they had abandoned their right to file a petition for certiorari in this Court.

The Court of Appeals refused to direct that the State Theatre be closed or that respondent be granted a monopoly of all of petitioner distributors' available pictures. It ordered that two merely formal changes be made in the decree. And, over the objection of the petitioners, it directed that the decree be modified so as to impose upon the petitioners the burden of proving compliance with the decree. 176 F. 2d 426 (July 29, 1949).

Judgment on respondent's appeal was entered on July 29, 1949, and the corresponding judgments on petitioners' appeals were entered on September 2, 1949.

JURISDICTIONAL STATEMENT.

This Court has jurisdiction to review the final judgment here in question under Section 1254 (1) of the Judicial Code, 28 U. S. C. 1254.

By order of this Court dated November 26, 1949, the time within which to file the petition was extended to January 3, 1950.

Petitioners seek review of the judgments of the Court of Appeals of July 21, 1948, July 29, 1949 and September 2, 1949.

STATUTES INVOLVED.

The statutes involved are the Sherman Act, 26 Stat. 209, 15 U. S. C. 1, 2, and the Clayton Act, 38 Stat. 731, 15 U. S. C. 15.

QUESTIONS PRESENTED.

1. May a court of appeals, using as the only basis the contradicted testimony of respondent and his brother-in-law, ignore findings of fact of a trial court that are almost entirely concerned with imponderables such as the design and purpose and intent of corporate officials and whether they had legitimate business motives, where such findings are amply supported by substantial evidence which the trial court believed?

2. May a court of appeals in a decree in a private anti-trust suit change the accepted rules of burden of proof by imposing on the defendants the burden of proof in any future proceeding to be instituted by the plaintiff in connection with any alleged violation of the decree?

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

1. In ignoring the findings of the trial judge, the Court of Appeals departed so far from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

2. In imposing upon petitioners the burden of proof in future proceedings to be instituted by the respondent for alleged violations of the decree, the Court of Appeals departed so far from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

3. The decision is in conflict with decisions of this Court and of courts of appeals of other circuits.

I.

In Ignoring the Findings of the Trial Judge, the Court of Appeals Departed so Far From the Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

The Court of Appeals held that there was a conspiracy despite the fact that the trial court after hearing voluminous testimony, and making detailed findings, had found that there was none. Throughout its opinion, the Court of Appeals proceeded to disregard all the pertinent findings of fact made by the trial court, and instead to substitute its own judgment based on the contradicted testimony of the respondent and his brother-in-law.

As Judge Goodrich pointed out in his dissent, the majority lifted from the record and employed for its purpose the flatly contradicted testimony of the respondent in preference to findings of the trial court which were supported by competent evidence and "backed up by circumstances which show that his conclusion is a rational one" (169 F. 2d 317, at 323-324).

We submit that the majority of the Court of Appeals misconceived the factual structure of respondent's case.

It treated the case as though it were one in which the petitioners combined to freeze respondent out of all first run pictures in Ambridge—as though it were a case in which respondent had merely sought and was, by petitioners' concerted action, prevented from having a chance to compete with Notopoulos and Pennware on an equal basis.

The majority, in its opinion, stated at 169 F. 2d 317, 321:

> "When an industry [5] is so powerful that it can and actually does refuse to permit the existence of an individual enterprise, such as appellant's, within its confines (and that's what the shutting-off of first runs from Penn probably amounts to) that industry is going beyond its freedom to trade as it chooses * * * we think that is what happened here * * *."

We submit that is **not** what happened here.

The statement by the majority that "much could be said about the fairness of appellant's own actions", is a masterpiece of understatement. Respondent's conduct was reprehensible. He bought the Penn Theatre property intending to oust Notopoulos and Pennware, and to gain a monopoly position in the town of Ambridge by pooling his theatre with the two theatres of Warner Bros. which were at the time the only other theatres in the town.

5. The use of the term "industry" connotes combination and agreement. No one of the defendants is an "industry" and, indeed, all the defendants are only a part of an "industry".

When respondent found that his scheme to squeeze Notopoulos out of Ambridge was being thwarted by the construction of a new theatre, he made an attempt to have the War Production Board stop it (Finding No. 23; R. 549). He also concocted a spurious ground for immediate termination of Notopoulos' lease of the Penn Theatre, and for obtaining possession of the theatre before the end of the term so that he could meet Bernhard's condition that Ball have possession of the theatre before the details of a pooled operation could be discussed (Finding No. 20; R. 548). Failing all this, he attempted a combination of offering spurious inducements and making threats to induce three of the petitioner distributors to give him an exclusive license for a period of a year for all their available pictures (R. 88, 107, 121-122, 159, 233, 859, 972, 1015). When the distributors refused, he started building evidence for an anti-trust suit (Judge Goodrich's Opinion, 169 F. 2d 317, at 323).

There is not a line of testimony anywhere in the record which would justify a finding that the distributors concertedly refused to permit the existence of respondent's enterprise by shutting off first-runs. He never sought merely an equal opportunity to compete with Pennware for first-run pictures and to get a fair apportionment of the pictures. If that had been his objective, he would have joined the other major distributors in the suit. He sought, first by threats and then by this suit, to compel the distributors to give him a monopoly of the available balance of their first run pictures—those pictures not licensed by the distributors for exhibition in Warner Bros.' theatres in Ambridge.

It is undisputed that what respondent was demanding was **all** of the product previously licensed to Notopoulos.

Respondent's first letter, dated March 30, 1944, advised Loew's, RKO, and Twentieth Century-Fox that this was what he was seeking (Finding No. 36; R. 553, 33, 37 and 40).

Similarly, in his proposal to Loew's, RKO and Twentieth Century-Fox, in April, May and June, respectively, he was attempting to bargain for a full year's supply of the available product of each (R. 124, 954, 1017). The deal he was proposing was for **all** the pictures previously made available to Pennware. In other words, the distributors were to be compelled to deal with respondent and to exclude Notopoulos entirely.

The amended complaint, in which the anti-trust violations were alleged, was filed on July 6, 1944. In it respondent demanded (R. 19):

> "(7) That preliminarily until hearing and perpetually thereafter, the defendants herein be enjoined and restrained from entering into any contracts or agreements for the licensing of feature product on the run formerly enjoyed by the Penn Theatre."

In explaining to the court the relief demanded, counsel for respondent said (R. 617):

> "* * * Now, the matter before the Court at this time is a motion to enjoin preliminarily the defendants, pending a final hearing, **from furnishing pictures to the State Theatre**; also to go a step further and feel that **they should be compelled to furnish them to the Penn Theatre.** * * *"

Once again respondent's counsel set forth respondent's position by saying (R. 791):

> "(1290) * * * We then want an injunction against all of these parties, **requiring them to give pictures**—first run pictures—**to this Penn Theatre** and to restrain them **from furnishing pictures to the State Theatre,** which companies had heretofore sold their product to the Penn Theatre."

Rule 52 (a) of the **Federal Rules of Civil Procedure** provides:

> "• • • Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses. • • •"

The comment to the rule indicates that it accords with the decisions on the scope of the review in modern equity practice.

In **Adamson v. Gilliland**, 242 U. S. 350 (1917), Mr. Justice Holmes, with characteristic succinctness, stated the prior law:

> "• • • Considering that a patent has been granted to the plaintiff the case is preeminently one for the application of the practical rule that so far as the finding of the master or judge who saw the witnesses 'depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.' Davis v. Schwartz, 155 U. S. 631, 636. • • •"

In the recent decision of this Court in **United States of America v. Yellow Cab Company, Inc., et al.**, filed December 6, 1949 (18 U. S. L. Week 4040), Mr. Justice Jackson, in affirming the trial court, said:

> "What the Government asks, in effect, is that we try the case *de novo* on the record, reject nearly all of the findings of the trial court, and substitute contrary findings of our own. Specifications of error which are fundamental to its case ask us to reweigh the evidence and review findings that are almost entirely concerned with imponderables, such as the intent of parties to certain 1929 business transactions, whether corporate officers were then acting in personal or official capacities, what was the design and purpose and intent of those who carried out twenty-year-old transactions, and

whether they had legitimate business motives or were intending to restrain trade of their competitors in car manufacture, such as General Motors, Ford, Chrysler and Packard.

* * *

"Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them. If defendants' witnesses spoke the truth, the findings are admittedly justified. * * *"

That is the precise situation here. Yet, the Court of Appeals did the very thing this Court refused to do. As Judge Goodrich indicated in the opening paragraph of his dissenting opinion, counsel for respondent frankly stated at the oral argument that unless the findings of fact were set aside, the judgment would have to be sustained.

The Court of Appeals sought to evade the mandate of Rule 52 (a) on the ground that the Rule did not apply since Judge Gibson had not seen all the witnesses.

The answer to this is clear.

Judge Gibson heard and saw on the witness stand all but one of the respondent's witnesses, and that one did not testify at all on conspiracy, but only on the alleged damage to the theatre (R. 55). Judge Gibson also heard and saw on the witness stand thirteen of petitioners' witnesses. Accordingly, the principle of Rule 52 (a) is particularly applicable in these respects:

(a) Judge Gibson heard and saw the plaintiff Ball testify in rebuttal. He noted, as the printed record cannot do, the demeanor of the witness, the intervals between questions and answers, the witness's general conduct on the stand. Judge Gibson disbelieved Ball's testimony.

(b) Judge Gibson heard and saw the plaintiff's agent, Friedman, testify in rebuttal. He observed that Friedman's photographs of the Penn Theatre taken a few days after Notopoulos left showed much greater damage than the contemporaneous photographs (R. 564). He had heard Friedman accused of admitting an attempt to build up evidence (R. 868). He heard no denials from Friedman, even though Friedman was recalled on behalf of the plaintiff in rebuttal before Judge Gibson.

(c) Judge Gibson heard and saw the representatives of each distributor who testified at the trial. These men told in detail exactly what they did for their respective companies and the reasons they did so. Everyone of them committed perjury if there was a conspiracy. Judge Gibson was impressed by their fair and frank answers, by their obvious sincerity. An experienced trial judge can appraise human nature, but the printed record is cold. Judge Gibson believed that these men were telling the truth; if they were, there could not have been a conspiracy.

Rule 52 (a) does not require the trial judge to have the opportunity to determine the credibility of **every witness.** It means that where he has confronted **a witness**, his decision as to the credibility of **that witness** is controlling. And where, as here, he has confronted so many witnesses that his opinion as to credibility of the group must be vital, that opinion is not diminished in value because there is some witness he has not seen. Were this not so, in any case where one out of twenty witnesses testified by deposition, the findings of the trial court on the truthfulness of the nineteen would have no value.[6]

6. It will be remembered further that the parties stipulated that "* * * All proceedings before Judge Schoonmaker shall be deemed to have been before such assigned Judge [Judge Gibson]." See page 7 *supra*.

The Court of Appeals disregarded the findings of fact. The opinion states (169 F. 2d 317 at 318-319):

> "Finally, if the mass buying power of appellees (unquestionably here involved even if each distributor were assumed to have acted independently of the others as the court below found) [7] was unlawfully employed, then, under the particular facts, the findings were not only inadequate but erroneous."

However, the trial court did not find that mass buying power was unlawfully employed. Instead it found that mass buying power was not employed at all. The findings were that no representatives of Paramount had any part in securing licenses for Pennware (Finding No. 32), and that neither Loew's, RKO, nor Twentieth Century-Fox was influenced by Paramount or its power in the motion picture industry (Finding No. 34). The Court of Appeals no where even attempted to show in what respect these findings are clearly erroneous.

The petitioner distributors' testimony, if believed, proves that there was no conspiracy. And the ordinary business judgment exercised by the distributors, in the light of what respondent really offered, was reasonable.

This is a fact case. Respondent and his brother-in-law, Friedman, testified to one set of facts as to conspiracy, and a third witness testified as to the alleged damage to the theatre. Nineteen (19) witnesses in person and six by deposition testified categorically to the contrary. This was not a question of inference. One group or the other was to be believed. The trial judge believed the petitioner distributors' witnesses. And when believed, the testimony of these witnesses compels the result reached by the trial judge.

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7. The part in parentheses is contained in a footnote in the reporter.

II.

In Imposing Upon Petitioners the Burden of Proof in Future Proceedings to Be Instituted by the Respondent for Alleged Violations of the Decree, the Court of Appeals Departed so Far From the Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

In its opinion filed July 29, 1949, 176 F. 2d 426, the Court of Appeals directed the District Court to add a new paragraph to the decree, reading as follows:

> "3. In any proceeding instituted by plaintiff in connection with the alleged violation of this decree in the future at any time by any of the defendants, the burden of proving compliance with the terms of the decree shall be upon the defendants."

This is a unique provision in an equity decree. The Court of Appeals cited no authority for it, and we have been unable to find any.

The argument advanced by the respondent in requesting for the first time in the Court of Appeals inclusion of such a provision in the decree, was that the mere entry of the decree without more would not necessarily assure the respondent the relief desired. This is, of course, true of every equity decree and is the reason the remedy of contempt is available.

The only support adduced by the respondent for such a provision is Mr. Justice Douglas' language in **United States v. Paramount Pictures, Inc., et al.**, 334 U. S. 131, 148 (1948), pertaining to the exceedingly complicated question of clearance when included in a decree nationwide in scope entered at the instance of the Government. The Court of Appeals conceded that, unlike the **Paramount** Case, the present case involves no question of clearance; and, of course, the nationwide aspect is likewise absent. Nor is the present case one instituted by the Government.

Further, clearance is itself a restraint; and to the extent that it is unreasonable, it may be an illegal restraint. The burden put on the defendants in such a case is to prove that this restraint is not unreasonably, and therefore illegally, imposed. But even the decree in the **Paramount** Case does not place upon the defendants the burden of proving compliance with the decree as a whole, or with its injunctive provisions. The burden of proof remains on the Government as to all provisions, except the provisions as to clearance.

The only reason advanced by the Court of Appeals for the inclusion of this unprecedented provision in the decree is a desire to eliminate as far as possible any excuse for unnecessary, harassing litigation. We submit that the direct reverse will be the result.

The Court of Appeals indicated that statistics concerning film rentals and other comparative picture and theatre data relevant to compliance are available to the petitioner distributors and unavailable to respondent. But the District Court has adequate power to make all such data available in any proceeding before it pertaining to compliance with its own decree. See Rules 26, 27, 30, 31, 33, 34 and 37 of the **Federal Rules of Civil Procedure.**

And the decree itself is explicit, providing in paragraph 4 as follows:

> "4. This decree is final, but jurisdiction of this cause is retained for the purpose of enforcing this decree or of enabling any party to move to modify any of the provisions of this decree."

This guarantees to the respondent that if and when a question of compliance arises, he will be able to move the District Court for any relief to which he may then be entitled. It is certainly unnecessary for the Court of Appeals to reverse all the accepted rules of procedure, and to decree in advance where the burden of proof shall lie in proceedings not yet instituted.

The principle that the burden of proof in any litigation rests upon the moving party is deeply ingrained in our jurisprudence. It should not be discarded by judicial fiat in a case like the present one.

III.

The Decision of the Court of Appeals Is in Conflict With Decisions of This Court and of Courts of Appeals of Other Circuits on the Same Matters.

As we have already pointed out, the decision of the Court of Appeals is in direct conflict with the decision of this Court in **United States v. Yellow Cab Company**, filed December 6, 1949 (18 U. S. L. Week 4040), in its interpretation of Rule 52 (a).

The decision is also in conflict with the decisions of the Court of Appeals for the Fourth Circuit in **Westway Theatre Inc. v. Twentieth Century-Fox Film Corporation, et al.**, 30 F. Supp. 830 (aff'd 113 F. 2d 932 (1940)) and the Court of Appeals for the Seventh Circuit in **Gary Theatre Co. v. Columbia Pictures Corporation, et al.**, 120 F. 2d 891 (1941). In both of these cases the facts were similar to the facts in the present case. In the **Westway** Case Rule 52 (a) was not discussed, but there was necessarily involved the question of the weight to be accorded to the findings, and the Court of Appeals affirmed on the opinion of the district court judge. In the **Gary Theatre** Case, the Court of Appeals expressly applied Rule 52 (a) and held that the findings were not clearly erroneous.

That part of the decree of the Court of Appeals which imposes the burden of proof on petitioners in any future proceedings brought by respondent for compliance with its decree is in direct conflict with many decrees which have been affirmed on appeal by Courts of Appeals for other circuits in private suits under the anti-trust laws. In none of these decrees is there to be found a provision such as imposed upon petitioner distributors here.

CONCLUSION.

For the reasons set forth above, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the Third Circuit, commanding that Court to certify and send to this Court for review and determination, on a day certain to be therein named, a transcript of the record and proceedings of the said Court of Appeals had in the cases numbered in its docket, Appeal Nos. 9233, 9874, 9883, 9886 and 9887, and entitled in the manner set forth in this petition, and that the judgments of the Court of Appeals be reversed by this Honorable Court, and your petitioners have such other and further relief as to this Honorable Court may seem just.

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI.

Portions of **Sherman Act** (Act of July 2, 1890, 26 Stat. 209, 15 U. S. C. 1 et seq.) in question:

Section 1 (15 U. S. C. Sec. 1):

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *"

Section 2 (15 U. S. C. Sec. 2):

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *"

Portions of **Clayton Act** (Act of October 15, 1914, 38 Stat. 731, 15 U. S. C. Sec. 15) in question:

Section 15 (15 U. S. C. Sec. 15):

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. * * *"

Portions of Rule 52 of the **Federal Rules of Civil Procedure** in question:

"(a) Effect. In all actions tried upon the facts without a jury *or with an advisory jury,* the court shall

find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. • • •"

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1949.

Nos. 520, 521, 522, 523 AND 524.

PARAMOUNT PICTURES, INC., PENNWARE THEATRE CORPORATION, A. N. NOTOPOULOS, RKO RADIO PICTURES, INC., LOEW'S INCORPORATED, TWENTIETH CENTURY-FOX FILM CORPORATION, AND PARAMOUNT FILM DISTRIBUTING CORPORATION,

Petitioners,

v.

HARRY NORMAN BALL, TRUSTEE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

STATEMENT OF THE CASE.

The statement of facts as set forth by petitioners demands a counter-statement by the respondent at least with respect to certain matters.

The respondent, in addition to his original investment in the Penn Theatre, expended more than $30,000. (R. 74a) for its restoration and re-equipment after Pennware Theatre Corporation had moved out. His total investment is in excess of $140,000 (R. 611a) which is greater than the cost of the State Theatre (R. 571a, 574a).

The first run product of the distributor-petitioners had been exhibited for over ten to thirteen years prior to 1944 at the respondent's theatre (R. 4, 216a, 277a, 287a, 292a, 357a) which was in the "100% location" in the town of Ambridge (598a, 599a).

When Pennware—whose stock was owned 50% by Paramount and whose Board of Directors consisted of three members, two of whom were Paramount officials (R. 236a, 237a)—moved from the Penn Theatre, all of the distributor-petitioners declined to license any of their first run product for exhibition at the Penn Theatre, irrespective of prices or terms (R. 88a, 89a, 93a, 94a, 107a, 122a, 132a, 584a, 591a). The first run product of distributor-petitioners was removed to the State Theatre, which during a time of war had been converted by Pennware Theatre Corporation from a garage to a theatre (R. 4), and the respondent, who was thereafter unable to obtain any first run pictures from the distributor-petitioners (R. 5, 39a, 40a) was required to keep his theatre closed (R. 136a).

The president of Paramount Pictures, Inc. testified that it was common sense to move all product to a new theatre taken over by Paramount if such action would increase its revenue (R. 390a).

The record shows with reference to rental that the respondent also made offers to lease his theatre at any rental to be fixed by arbitration (R. 614a, 574a). When he sought to oust petitioners from his theatre, the rent had been unpaid for two months (R. 611a). Also, the Pennware Theatre Corporation was in the process of constructing a new theatre at least six months prior to the termination of the lease (R. 612a).

The respondent testified that his conversation with an officer of Warner Brothers was for the purpose of exploring the possibilities of procuring tenants or operators for the Penn Theatre (including even the possibility of some joint operation) in the event that it became necessary for the respondent to operate it (R. 612a).

Petitioner Notopoulos, president of Pennware, threatened to damage physically the theatre (R. 503a). Petitioners Paramount and Pennware threatened to remove the first run product therefrom (R. 30a, 31a, 47a). The theatre was damaged (Respondent's Exhibits 1-15, inc., R. 57a-63a) and the first run product was removed (R. 39a, 40a).

Argument.

I. THE COURT OF APPEALS PROPERLY HELD THAT THE DISTRICT COURT HAD FAILED TO ACCEPT THE CLEAR IMPLICATIONS ARISING FROM PETITIONERS' ACTS AND CONDUCT.

The Court of Appeals, after a careful review of the evidence, by its decision of July 21, *1948* (concerning which the petitioners had not sought review by this Court either by petition for certiorari or otherwise until the filing of the present petition on January 3, *1950*) correctly held that there was a conspiracy among the petitioners under the Sherman Act and Clayton Act, and correctly rejected the conclusion of the District Court that the actions of the distributors in uniformly and simultaneously shutting off their product from the Penn Theatre was "merely an amazing coincidence".

Rule 52 (a) does not require a Court of Appeals in reviewing the record of the District Court to accept inferences and conclusions which the District Court has made from the material facts in the case, nor does it prevent a Court of Appeals from considering uncontroverted salient facts which had been overlooked by the District Court. The designation by a District Court of a so-called finding as a "Finding of Fact" does not remove such matter from the examination and consideration of a Court of Appeals.

In *Baumgartner v. United States,* 322 U. S. 665, (1944) this Court, through Mr. Justice Frankfurter, said on page 670:

> "The phrase 'finding of fact' may be a summary characterization of complicated factors of varying significance for judgment. Such a 'finding of fact' may be the ultimate judgment on a mass of details involving not merely an assessment of the trustworthiness of witnesses but other appropriate inferences that may be drawn from living testimony

which elude print. The conclusiveness of a 'finding of fact' depends on the nature of the materials on which the finding is based. The finding even of a so-called 'subsidiary fact' may be a more or less difficult process varying according to the simplicity or subtlety of the type of 'fact' in controversy. Finding so-called ultimate 'facts' more clearly implies the application of standards of law. And so the 'finding of fact' even if made by two courts may go beyond the determination that should not be set aside here. Though labeled 'finding of fact', it may involve the very basis on which judgment of fallible evidence is to be made. Thus, the conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of 'fact' that precludes consideration by this Court."

See also *United States v. United States Gypsum Co.*, 333 U. S. 364 (1948) in which Mr. Justice Reed said on page 395:

> "The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

Not only was the Court of Appeals permitted to consider the inferences and conclusions made by the District Court under any circumstances, but it was all the more necessary that that court do so since part of the evidence had originally been heard by Judge Schoonmaker, who died after *half* of the witnesses in the case, including some of petitioners' witnesses, had testified and the direct

portion of the respondent's case had been presented (R. 4). Thereafter, the balance of the case was heard by Judge Gibson, who was in no better position to consider the testimony presented before Judge Schoonmaker than was the Court of Appeals who reviewed the entire record. The record in this case cannot be arbitrarily divided into two parts—one heard by Judge Schoonmaker and the other heard by Judge Gibson, and a finality given the findings of fact which in some respects related to witnesses which Judge Gibson heard, especially since the direct portion of respondent's case with respect to the conspiracy had not been heard by him but by Judge Schoonmaker.

The petitioners have argued that because the District Court found that mass buying power was not employed at all, such finding was conclusive in this matter; when, as a matter of fact, the holding of the District Court was merely an inference and conclusion on the vital question of conspiracy and was clearly erroneous both as to fact and inference. The basic facts in the case are indisputable and were recognized by the Court of Appeals. Before the lease for the Penn Theatre had expired, work on the erection of the State Theatre had been commenced (R. 612a). The lease for the Penn Theatre was not renewed and the State Theatre was then opened (R. 219a, 357a). The product which had theretofore been enjoyed by the Penn Theatre was then transferred by the petitioners to the State Theatre, and the respondent, as the owner and operator of the Penn Theatre, from that time on was unable to obtain the product to which the Penn Theatre was entitled and was denied access to any first-run products of petitioners (R. 39a, 40a).

The fact that various witnesses who testified on behalf of the petitioners stated that they did not actively conspire against the respondent, and did not know of any conspiracy, does not by any means negative the inescapable conclusion that there was a violation on the part of the petitioners of the anti-trust laws. What the petitioners did

in fact speaks so loudly that the Court of Appeals in reviewing the matter could not and did not accept their oral protestations to the contrary.

In *United States v. Griffith*, 334 U. S. 100 (1948), this Court very clearly pointed out that a conspiracy can be found as a consequence of a defendant's conduct and business arrangements and that it is not always necessary to find a specific intent to restrain trade or to build a monopoly.

The argument of petitioners that respondent intended to gain a monopoly position with Warner Bros. is obviously made to distract attention from the fact that Warner Bros. and Paramount's affiliate Pennware Theatre Corporation enjoyed a monopoly position in Ambridge for more than ten years prior to the purchase by respondent of the Penn Theatre, that during such time they made a division between themselves of all first-run product, and that for some time thereafter that arrangement between Warner Bros. and Pennware continued while respondent's theatre was closed. The common business interests of Warner Bros. and Paramount, running into millions of dollars of transactions between them (R. 403a-407a) demonstrates the absurdity of such a charge. The sole basis relied upon by petitioners for such argument is the fact that respondent, in the interest of preserving an investment, sought to explore the possibilities about the operation of his property and made inquiry of several possible lessees or operators of theatres, including Warner Bros. (R. 612a).

Finally, the Court of Appeals, while recognizing the charges and counter-charges which normally arise under similar situations, and after fully considering the same questions which have been raised by the petitioners in their Petitions for a Writ of Certiorari, concluded that the petitioners had violated the Sherman and Clayton Acts in "shutting off of first runs" from the Penn Theatre, and that a careful study of any action on the part of the respondent "develops no excuse for the stoppage by ap-

pellees of Penn Theatre's first runs" (R. 9). The evidence and record pointed unmistakably to the conclusion that the petitioners who represented "all branches of this tremendous industry are engaged in a conspiracy against the appellant (respondent herein) that is both horizontal and vertical" (R. 9).

II. AN INJUNCTION DECREE UNDER THE SHERMAN AND CLAYTON ACTS MAY PROPERLY IMPOSE UPON CONSPIRATORS THE BURDEN OF PROVING COMPLIANCE THEREWITH IN ANY PROCEEDING FOR ALLEGED VIOLATION.

A consideration of the nature of proceedings under the Sherman Act and the Clayton Act and of the relief to be afforded a successful plaintiff thereunder will reveal the reason for such a provision, as was recognized by the Court of Appeals in its opinion dated July 29, 1949 (R. 20):

> ". . . we are interested primarily in seeing to it that the decree really works out in practical fashion as intended. . . . we are desirous of eliminating as far as possible, any excuse for unnecessary, harassing litigation by either side. Having appellees establish compliance with the decree will be of substantial help to that end. This will cause no undue hardship to appellees. Indeed, it can be far more easily and satisfactorily accomplished by them than by appellant. Within their own organization, nationwide statistics are readily available concerning film rentals and other comparative picture and theatre data. Most of such special knowledge would be difficult if not impossible for appellant to obtain. The procedure indicated finds strong support in United States v. Paramount Pictures, Inc., 334 U. S. 131."

In *United States v. Crescent Amusement Co.*, 323 U. S. 173 (1944), this Court through Mr. Justice Douglas said on page 186:

"Where the proclivity for unlawful activity has been as manifest as here, the decree should operate as an effective deterrent of a repetition of the unlawful conduct . . ."

It is significant that the petitioners have been unable to submit any citation which would hold such a provision to be improper.

III. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT OR OF THE COURT OF APPEALS OF ANY OTHER CIRCUIT.

The decision of the Court of Appeals in no way conflicts with any decision of this Court or of any Court of Appeals. In fact, the case is simply that of a private litigant who was excluded from the motion picture industry and whom the Court of Appeals has held is entitled to the relief afforded by the Sherman and Clayton Acts.

The decisions cited by the petitioners do not present any conflict.

The distinction between the present litigation and that in *United States v. Yellow Cab Company,* 338 U. S. 338 (1949), is obvious. Counsel for the defendant in the *Yellow Cab Company* case has informed us that the entire case was tried in open court before one judge who heard and saw all the witnesses and that no testimony was presented by depositions. Furthermore, in that case, the Government, as appellant, challenged *all* the findings of fact made by the trial court, and this Court declined to upset findings of fact made upon conflicting but *substantial* evidence. In the present case, the Court of Appeals did not overturn any true finding of fact. What it did, we feel, was to follow the latest pronouncements of this Court in the cases of *United States v. Paramount Pictures, Inc.,* 334 U. S. 131 (1948), *United States v. Griffith,* 334 U. S. 100 (1948), and *Schine Theatres v. United States,* 334 U. S. 110 (1948), and to draw inferences and conclusions from the admitted or

indisputable facts, even though they were contrary to the conclusions made by the trial court, which, at the time of its decision, did not have the benefit of those opinions.

The two cases of *Westway Theatre v. Twentieth Century-Fox Film Corporation,* 30 F. Supp. 830 (D. C. Md. 1940) (affirmed *per curiam* in the Court of Appeals for the Fourth Circuit on the opinion of the court-below and reported in 113 F. (2d) 932 (1940)) and of *Gary Theatre Co. v. Columbia Pictures Corporation,* 120 F. (2d) 891 (C. C. A. 7th, 1941), are also not in conflict with this present case. The *Westway Theatre* case was a suit by an exhibitor who came into a territory with a new theatre and complained that clearances imposed on his theatre in favor of the older established theatre would be a violation of the anti-trust laws. The Court in failing to find a conspiracy commented significantly that "it seems to be a common occurrence in the business that old and established theatres in the vicinity of a new theatre demand, or at least seek, a clearance over the new theatre."

In the case at bar, the new theatre in the hands of monopolists in the motion picture industry eliminated the older established theatre of the respondent in order to forward and maintain the position of Paramount and its affiliated company.

In the *Gary Theatre* case, the plaintiff was the owner of the Palace Theatre, Gary, Indiana, and questioned the right of exhibitors to license film under "priority of run and clearance". In the *Gary* case there was no simultaneous shutting off of runs from a theatre. Moreover, the decision in the *Gary Theatre* case is at variance with the later decision in the same court, namely, *Bigelow v. RKO Radio Pictures, Inc.,* 162 F. (2d) 520 (1947) (cert. den. 332 U. S. 817 (1947)), and with the decisions of this Court in the *Griffith, Schine* and *Paramount* cases, *supra.*

The *Westway Theatre* case and the *Gary Theatre* case are similar to the instant case only in the fact that they each concern the question of motion picture products for theatres, but at that point the resemblance ends. In neither

of the cases was there any disturbance of any prior situation of status quo. What the plaintiff in each of the two cases wanted to do was to upset the former status and to demand that the distributors enter into an entirely new course of dealings. And, in any event, any doubt as to the right of an exhibitor under circumstances of the present case has been laid to rest by the decisions of this Court in the *Paramount, Griffith* and *Schine* cases, *supra.*

CONCLUSION.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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